171 (1)

Supreme Court, U.S.
FILED

No. 10-429 SEP 27 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOEL D. WALKER and PATRICIA A. WALKER,

Petitioners,

v.

H.L. CROMARTIE, III; H.L. CROMARTIE, III PC; and HUSSER & CROMARTIE LLP,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the States under the guise of "tort reform" seize an individual's meritorious professional negligence cause of action for failure to attach an expert affidavit to the complaint and without compensation and without benefit of hearing in violation of the Fifth Amendment Takings Clause and the Fourteenth Amendment Due Process and Equal Protection Clauses?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are fully identified in the above-styled caption in this matter.

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SCHOLARLY AUTHORITIES

Certificates of Merit and Medical Malpractice: What's at Stake for States, Amy Widman, Center for Justice & Democracy (October 30, 2009) www.centerjd.org/archives/issue-facts/CertificatesofMeritF.pdf 18, 22, 24

C.F. Overby, et al., Survey Article, Trial Practice and Procedure, Annual Survey of Georgia Law, 47 Mercer L. Rev. 353, 368 (1995) 34

C. Kozak, "A Review of Federal Medical Malpractice Tort Reform Alternatives," 19 Seton Hall Legis. J. 599, 642 (2003) 31

C. Sharkey, "Unintended Consequences of Medical Malpractice Damages Caps," 80 N.Y.U. L. Rev. 391, 404 (2005) 31

Cynthia Trimboli Adams, et al., Torts, Annual Survey of Georgia Law, 47 Mercer L. Rev. 311, 317 (1995) 34

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David M. Kopstein, "An Unwise 'Reform' Measure".....31, 32

Elder Witt writing for Governing Magazine/ November 1987, http//www.governing.com/ archive/1987/nov/tort.txt Copyright 1987, Congressional Quarterly, Inc.....28

Georgia's Professional Malpractice Affidavit, Robert D. Brussack, University of Georgia School of Law 31 Ga. L. Rev. 1033, 1034, 1088, 1099 (1996-1997).....15, 32, 33, 34

J. Edgar, "Doctor v. Attorney: Why are Attorneys & Injured Patients Being Blamed for the Rising Costs of Healthcare? Instead of Tort Reform, Why Medical Reform is a Better Solution," 73 UMKC L. Rev. 773 (2005).....31

J. Hunter and J. Doroshow "Premium Deceit," The failure of "Tort Reform" to cut Insurance Prices. Copyright 1999, 2002 Center for Justice & Democracy 32

K. Frazier, "Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?" 31

"Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates" (June 2003) U.S. General Accounting Office (GAO-03-702) 35

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M. Stroub, "The Unforeseen Creation of a Procedural Minefield – New Jersey's Affidavit of Merit Statute Spurs Litigation & Expense in its Interpretation & Application," 34 Rutgers L.J. 279, 282 (2002).....31, 32

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Joel D. Walker and Patricia A. Walker, respectfully petition for a writ of certiorari to review the final judgment of the Supreme Court of Georgia.

DECISIONS BELOW

Indigent Petitioners' cause of action was dismissed in the lower courts for failure to attach an expert affidavit to their professional negligence cause of action without any hearing on the merits and Georgia seized the Walkers' cause of action without compensation. The lower courts rejected Petitioners' constitutional arguments that Georgia's Expert Affidavit statute, O.C.G.A. § 9-11-9.1 is repugnant to the United States Constitution.

The decisions of the Superior Court of Floyd County, Georgia 09-CV-00397, are reprinted in the Appendix ("App. ___") at 7-13. The decision of the Supreme Court of Georgia, S10A0518, June 28, 2010, is reprinted at App. 1-6. The decision of the Supreme Court of Georgia denying Petitioners' motion for reconsideration, S10A0518, July 12, 2010, reprinted at App. 14, is unpublished.

JURISDICTION

This action was filed in the Superior Court of Floyd County, Georgia. The court entered judgment in favor of Respondents. Petitioners timely appealed to the Supreme Court of Georgia. The final judgment of the Supreme Court of Georgia was entered on June 28, 2010. Petitioners' Motion for Reconsideration was denied by the Supreme Court of Georgia on July 12, 2010. This Court has jurisdiction under both 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(a). The constitutionality of Georgia statute O.C.G.A. § 9-11-9.1 is at question.

Pursuant to Rule 29.4(c), Petitioners recite the constitutionality of a Georgia statute is at question, and neither the State, nor any agency, officer, or employee thereof is a party, and that 28 U.S.C. § 2403(b) may apply.

Petitioners believe the lower court did not, pursuant to § 2403(b) certify to the State Attorney General the fact that the constitutionality of O.C.G.A. § 9-11-9.1 was at issue. Petitioners certify the notifications of Rule 29.4 have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The State of Georgia's relevant expert affidavit statute is codified as O.C.G.A. § 9-11-9.1 (2009), which in pertinent part provides:

> In any action for damages alleging professional malpractice against: A professional licensed by the State of Georgia and listed in subsection (g) of this Code section; the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim. If either affidavit is not filed within the periods specified in this Code section . . . , the complaint shall be dismissed for failure to state a claim. O.C.G.A. § 9-11-9.1(a)(1)(3)(b).

Entirety of O.C.G.A. § 9-11-9.1 is reprinted in the Appendix at App. 19-23.

STATEMENT OF THE CASE

1. Georgia's Expert Affidavit requirement mandates dismissal of a professional malpractice cause of action without a hearing if plaintiff does not obtain an expert competent to testify to provide an affidavit attached to his complaint stating the negligence of the defendant.

Petitioners did in fact suffer this draconian consequence in spite of an admitted meritorious claim.

Petitioners argued throughout the lower courts that O.C.G.A. § 9-11-9.1 violated the Fourteenth Amendment Due Process and Equal Protection Clauses and amounted to a state taking of their professional malpractice cause of action. The Fourteenth Amendment guarantees of Due Process and Equal Protection may not be violated by any form of government throughout the United States. The Fifth Amendment Takings Clause without compensation may not be violated by any form of government in the United States. This Court has made clear "As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest." *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

In spite of this Court's precedence, indigent Petitioners' cause of action was dismissed in the lower courts for failure to attach an expert affidavit to their professional negligence cause of action without any hearing on the merits and Georgia seized the Walkers' cause of action without compensation.

Accordingly Georgia's highest court should be reversed and the Expert Affidavit statute should be overturned.

Of the 25 or more states, including Georgia, that have implemented expert affidavit, certificate of merit,

or affidavit of reasonable cause statutes, virtually all have faced state and/or federal constitutional attack, with the *primary argument* being that such statutes deny plaintiffs **access** to present the merits of their case. This Court has held: "Under the United States Constitution, access is regarded as a corollary of due process of law." *Procunier v. Martinez,* 416 U.S. 396, 419, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974).

The resulting decisions the party's argued from these state courts of last resort are split on the issue of the Fourteenth Amendment Due Process and Equal Protection Clauses applicable to expert affidavit statutes.

This split of authority warrants speedy resolution as it perpetuates the deprivation of fundamental rights across the United States, mainly to those that cannot afford the costs of bringing into court the actors of professional malpractice. Perpetuation of the states lower courts on this issue of national Tort Reform will serve no purpose. Any individual party to a lawsuit, whether one sounding in professional or simple negligence should be able to expect the full protection of Due Process and Equal Protection, requiring a hearing on the underlying merits of the party's cause of action, making this an ideal case for this Court to decide.

2. Petitioners Joel D. and Patricia A. Walker ("Walkers") retained Respondent Attorneys H.L. Cromartie, III and H.L. Cromartie III, P.C. ("Cromartie") for legal representation in two related civil actions

totaling $174,000,000.00 in claims. The sum of that representation resulted in the Walkers filing ordinary negligence, professional malpractice, and breach of fiduciary claims against Cromartie, only after Cromartie admitted his negligence in court (recorded) and to the Walkers and agreed to take responsibility and thereafter refused to accept responsibility for his actions. App. 15-17.

The Walkers attempted to resolve the issues with Cromartie to no avail. The Walkers filed suit against Cromartie in the Superior Court of Floyd County, Georgia, on January 28, 2009.

Petitioners Joel D. and Patricia A. Walker preceded through the lower courts pro se in forma pauperis, and, aware of O.C.G.A. § 9-11-9.1, were unable to obtain an expert and his affidavit, due in part to the cost of such being from $3,000.00 to $20,000.00. App. 8, 10, 11. (*See, e.g., Plaintiffs' Brief in Reply to Defendants' Motions* . . . pg. 4-5) (May 2009).

Respondents answered Petitioners' verified complaint and made various motions, including a motion for attorney's fees, and a motion for partial dismissal relating to the Walkers' professional malpractice claim. Cromartie also raised an affirmative defense that "Plaintiffs' Complaint fails to comply with the requirements of O.C.G.A. § 9-11-9.1 and therefore must be dismissed." The Walkers timely responded to all Cromartie Motions by Brief with the following caption:

PLAINTIFFS' BRIEF IN REPLY TO DEFENDANTS' MOTION FOR ATTORNEY'S FEES, MOTION FOR PARTIAL DISMISSAL OF PLAINTIFFS' COMPLAINT, MOTION TO DISMISS FOR LACK OF SERVICE, TRAVERSE OF PAUPER'S AFFIDAVITS, AND, **PLAINTIFFS' REQUEST THAT THE COURT DISTINCTLY FIND AND DECLARE O.C.G.A. § 9-11-9.1 UNCONSTITUTIONAL** (May 24, 2009).

The Superior Court of Floyd County, Georgia, heard oral arguments on the motions July 6, 2009. On July 16, 2009, the court granted an order styled "Order on Defendant's Motion for Summary Judgment". The inferior court rejected Petitioners' ("Walkers") arguments that the Expert Affidavit statute denied both access to the courts, due process rights, equal protection rights, and their right to trial because, "This court finds that the statute is constitutional as applied here since there is no state action in play." Citing specifically *Peterson v. Columbus Medical Center Foundation, Inc.,* 243 Ga. App. 749, 533 S.E.2d 749 (2000) "[Expert affidavit requirement did not violate medical malpractice plaintiff's right to trial, to due process, and to equal protection under law, despite claim that she was unable to pay for the medical records necessary for obtaining affidavit; there was no state action, as costs of copying medical records were charged by private entities, not state.] *See also Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) [due process denied to

indigent plaintiffs who could not bring divorce action except upon payment of court fees and service of process costs]." Superior Court of Floyd County Georgia (Order July 16, 2009). App. 7, 8.

The inferior court order is noteworthy in that it summarily dismisses the Walkers' professional cause of action solely on the issue of the procedural requirement that an expert affidavit be attached to the complaint. The *Peterson, supra,* decision was correct in the first place but both the inferior and Supreme Court of Georgia's reliance on *Peterson* is misguided. Nothing in O.C.G.A. § 9-11-9.1 commands a plaintiff to obtain medical records and attach them to their complaint at the time of filing, what the statute [State] commands is "[T]he plaintiff **shall be required** to file with the complaint an affidavit of an expert competent to testify, . . . " O.C.G.A. § 9-11-9.1(a)(3). App. 19. Plaintiff *Peterson* could not complain that she was unable to produce an expert affidavit, because in fact she did. [Court found affidavit untimely]. Similarly, the inferior court noted in citing *Boddie v. Connecticut, supra*, this Court's precedent that if an indigent **could not** comply with a state procedural requirement to obtain a divorce then the plaintiff was denied due process. (emphasis supplied). The Walkers could no more comply with Georgia's Expert Affidavit statute than the plaintiffs' could comply with Connecticut's procedural statute in *Boddie, id.*

On July 31, 2009, in response to [Defendants'] motion for attorney's fees, the inferior court by Order

stated, "The court finds there was a justiciable for the court to address on this matter. The court therefore denies the defendant's motion for attorney's fees.") App. 12.

On the one hand, the inferior court summarily dismissed the Walkers' professional malpractice claim for failure to follow a procedural statute designed to reduce frivolous litigation, and then found 15 days later those same claims were not frivolous.

Petitioners' legal malpractice cause of action is a recognized property interest in Georgia that cannot be denied without due process. *Nix v. Long Mountain Resources*, 262 Ga. 506, 509, 422 S.E.2d 195 (1992).

Petitioners filed for a certificate of immediate review to Georgia's highest court on the constitutional issues raised in the inferior court. The Supreme Court of Georgia granted the Walkers' application for interlocutory review "in order to address the constitutional questions raised." (Opinion June 28, 2010 at n.2) App. 2.

The court below took briefs and heard oral arguments on March 9, 2010 and on June 28, 2010, issued its opinion which in pertinent part states: "Nothing in O.C.G.A. § 9-11-9.1 imposes a cost or fee for filing or obtaining an expert affidavit. The 'costs' appellants object to are created by private actors, not any state actor. Since no state actor has exacted the harm of which appellants complain, the statute does not violate the right to due process." "Likewise, the Statute does not violate equal protection." Citing *Peterson,*

supra, Supreme Court of Georgia (Opinion June 28, 2010). App. 2, 3.

As with the inferior court order, notably absent from the state Supreme Court opinion, are the underlying factual merits addressed, discussed, or *reached.*

There is no mystery as to why the lower courts did not consider or address the merit of the Walkers' professional malpractice claim. The state's procedural statute O.C.G.A. § 9-11-9.1 forecloses any judicial review of even a prima facie meritorious malpractice action. Because the state Supreme Court decision destroyed the Walkers' property interest in their cause of action without any hearing on the merits, such action violates the Fourteenth Amendment Due Process and Equal Protection Clauses as shown in *Logan v. Zimmerman, supra.*

Also absent in the state Supreme Court opinion the court did not consider Petitioners' many citations from this Court with respect to state procedural statutes and the interplay of the Fourteenth Amendment. App. 1-6.

Of particular interest in the state Supreme Court opinion, the court attempts to justify its holding that the Walkers had not been denied "access" to the court by the following statement:

> Finally, inasmuch as appellants' breach of fiduciary duty claim is still pending in the

> trial court, they have not in fact been denied access to the courts or a right to a trial by jury. App. 4.

Petitioners submit that this statement plainly portrays the Walkers' *professional malpractice cause of action* was denied process, much less due process.

The Walkers timely filed a Motion for Reconsideration which was denied by the lower court on July 12, 2010. (Unpublished) App. 12.

3. Because of the Walkers' inability to attach an expert affidavit to their complaint, the lower courts dismissed their legal malpractice cause of action, effectively taking the Walkers' property without compensation. This violates the Takings Clause of the Fifth Amendment as applied against the states through the Fourteenth Amendment. This Court recently described this very conduct as constituting a state taking of private property, "no less than if the State had physically appropriated it or destroyed its value by regulation." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. ___ (2010), pg. 10. (Affirmed on other grounds).

Petitioners argued throughout the lower courts that Georgia's Expert Affidavit statute either legislatively or judicially dismissed their cause of action without compensation. App. 15-18. (*See, e.g.*, Plaintiffs' Brief in Response to Defendants' Motions . . .

pg. 10, 20, Appellants Pro Se In Forma Pauperis Brief, pg. 29-30.)

The court below responded, "The dismissal of appellants' professional negligence claim is a purely judicial action." Supreme Court of Georgia (Order June 28, 2010, pg. 4 ¶ 3). App. 4.

In *Stop the Beach Renourishment,* this Court invited a future case to elucidate whether a state judicial actor could affect a taking in violation of the Fifth and Fourteenth Amendments. This case is an excellent vehicle to do so.

REASONS FOR GRANTING THE PETITION

I. The Highest Courts Of Numerous States Are Divided Over Whether Expert Affidavit Requirements In Professional Negligence Cause Of Actions Violate The Fourteenth Amendment Due Process And Equal Protection Clauses.

Of the twenty-five states with expert affidavit statutes constitutionally challenged at the state highest court level, there is a thirteen to twelve split over whether such statutes are constitutional.

Petitioners argued the following cases:[1] Respondents argued the following cases:[2]

Georgia enacted O.C.G.A. § 9-11-9.1 in 1987 requiring attachment of an expert affidavit in professional malpractice actions pursuant to a report issued in 1986 by a tort reform advisory committee appointed by Georgia's governor. The chair of the committee

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[1] State courts that have recognized the unconstitutionality of expert affidavit statutes. *Aldana v. Holub*, 381 So.2d 231, 237 (Fla. 1980); *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825, 837, 12 A.L.R.4th 1 (1980); *McCoy v. Western Baptist Hosp.*, 628 S.W.2d 634-35 (Ky.App. 1981); *Arneson v. Olson*, 270 N.W.2d 125, 136-37 (N.D. 1978); *Graley v. Satayatham*, 74 Ohio Op.2d 316, 343 N.E.2d 832, 836 (1976); *Anderson v. Assimos*, 146 N.C.App. 339, 553 S.E.2d 63, 68 (2001), *judgment vacated in part* (as relating to *res ipsa loquitur*), *appeal dismissed*, 356 N.C. 415, 572 S.E.2d 101 (2002). *See also, Hoem v. State*, 756 P.2d 780 (Wyo. 1988); *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058, 1067, 74 A.L.R.4th 1 (1987); *Austin v. Litvak*, 682 P.2d 41, 54, 50 A.L.R.4th 225 (Colo. 1984); *Boucher v. Sayeed*, 459 A.2d 87, 94 (R.I. 1983); *Jiron v. Mahlab*, 99 N.M. 425, 659 P.2d 311, 313 (1983); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736, 743, 80 A.L.R.3d 566 (1976); *People ex rel. Christiansen v. Connell*, 2 Ill.2d 332, 118 N.E.2d 262, 267 (1954); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190, 196 (1980); *Zeier v. Zimmer Inc.*, 2006 Ok. 98, 152 P.3d 861 (2006); *Summerville v. Thrower*, 369 Ark. 231, 239 253 S.W.3d 415 (2007); *Wimley v. Reid*, 991 So.2d 135, 138 (Miss.2008); and *Putman v. Wenatchee Valley Medical Center*, 166 Wn.2d 974, 216 P.3d 374 (Wash. 2009).

[2] State courts that have recognized the constitutionality of expert affidavit statutes: *See, e.g., Matter of Application of Sitter*, 167 F.R.D. 80, 82 (D.Minn. 1996); *In re Hall*, 147 N.J. 379, 688 A.2d 81, 87 (1997); *Szydel v. Markman*, 121 Nev. 453, 117 P.3d 200, 204 (2005).

strongly supported the affidavit requirement because it will have a substantial impact in the reduction of the number of groundless suits filed against professionals and businesses.[3] This is the common underlying theme of almost every state that has invoked affidavit of merit statutes.

Interestingly, prior to Georgia's highest court ruling in the instant matter on July 12, 2010, the state's highest courts in Oklahoma (2006); *Zeier v. Zimmer, Inc., supra,* Arkansas (2007); *Summerville v. Thrower, supra,* Mississippi (2008); *Wimley v. Reid, supra,* and Washington (2009); *Putman v. Wenatchee Valley Medical Center, supra,* overturned their professional expert affidavit statutes on constitutional law.[4]

Conversely, Respondents offered two state challenges upholding expert affidavit statutes on due process grounds, one of which, *Gill v. Russo*, 39 S.W.3d 717, 719 (Tex. App. 2001) is not from a state's highest court, but merely agrees with the highest court in Missouri that an expert affidavit requirement does not restrict plaintiffs' access to the courts because "the [affidavit of merit] denies no fundamental right, but at most merely 'redesigns the framework of the *substantive law*' to accomplish a rational

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[3] Georgia's Professional Malpractice Affidavit, Robert D. Brussack, University of Georgia School of Law 31 Ga. L. Rev. 1036 (1996-1997).

[4] *Zeier v. Zimmer* considering "access" and equal protection, along with *Wimley v. Reid* and *Putman v. Wenatchee Valley Medical Center.*

legislative end." *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 510 (Mo. 1991) (emphasis supplied). Compare both *Summerville v. Thrower* and *Wimley v. Reid, supra,* finding expert affidavit statute violating state Rules of Civil Procedure, and *Westmoreland v. Vaidya*, 222 W.Va. 205, 664 S.E.2d 90 (2008) *concurring opinion* in the West Virginia Supreme Court (Cost of expert affidavit purported to be $40,000.00):

> It is my assessment that the MLPA is a procedural monster that is wholly contrary to the common law. As such, it is entitled to little deference and must be strictly and narrowly construed to do as little harm to the common law as possible. Pre-suit notices and screening certificates of merit have some meritorious public policy goals, but these procedural humps should not be interpreted to restrict, delay, or deny citizens' access to the courts.
>
> I therefore concur. (*Affirmed in part, reversed in part, and remanded.)*
>
> Footnote: 1
>
> There is nothing in the record, aside from Dr. Westmoreland's assertions, that specifically supports this contention [$40,000.00 cost of expert affidavit]. However, if a record were developed showing that the MLPA imposed a prohibitively high cost upon lawyers and litigants that impaired the fair administration of justice, a substantive case could better be made that the pre-suit certificate of

> merit provisions of the MPLA violate constitutional due process, equal protection and open court protections.

If the Walkers had brought suit in Oklahoma almost a year earlier for a professional negligent action, it would have survived:

> "[T]he cost of obtaining the affidavit – $500.00 to $5,000.00 creates an unconstitutional financial barrier to **access** to the Courts guaranteed under the Oklahoma Constitution. The additional certification costs have produced a substantial and disproportionate reduction in the number of claims filed by low-income plaintiffs. The affidavit of merit provisions front-load litigation costs and result in the creation of cottage industries of firms offering affidavits from physicians for a price. They also prevent meritorious malpractice actions from being filed. Rather than reducing the problems associated with malpractice litigation, these provisions have resulted in dismissal of legitimately injured plaintiffs claims based solely on procedural, rather than substantive grounds." "In at least one instant, an affidavit of merit cost the litigant $12,000.00. A statute that so conditions one's right to litigate impermissibly **denies equal protection** and closes the court house doors to those financially incapable of obtaining a pre-petition medical opinion."

Zeier v. Zimmer, Inc. (2006), *supra* (emphasis supplied).

Similarly had the Walkers brought suit in the state of Washington *this* year for a professional negligent action, it would have survived:

> Because we find that the certificate of merit requirement unduly burdens the right of access to courts, . . . we do not reach Putman's arguments that the certificate of merit . . . violates the equal protection clause of the United States Constitution . . . and violates the due process clause of the United States Constitution.

Putman v. Wenatchee Valley Medical Center (2009), *supra*.

This split of authority is ripe for resolution at this time. At the federal level, the President of the United States invites "tort reform" regulations for the entire country.[5] For over twenty years, the states have been embroiled at their highest courts over the most basic of constitutional issues. Do the protections of one group swallow the individual right of protection of property? As discussed, *infra,* the Fourteenth Amendment Due Process Clause in relationship with expert affidavit requirements in professional negligence cause of actions has been scholarly debated

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[5] "As President Obama announced last night, we're going to move forward with an initiative to investigate whether we can improve our malpractice system . . . , including certificates of merit." Secretary of Health and Human Services, Kathleen Sebelius, September 10, 2009. Certificates of Merit and Medical Malpractice: What's at Stake for States, Amy Widman, Center for Justice & Democracy (October 30, 2009) www.centerjd.org/archives/issue-facts/CertificatesofMeritF.pdf.

over almost twenty-five years in a manner that would empower the Court to reach a comprehensive and just resolution of this important issue.

II. The Court Below Decided An Important Question Of Law In A Manner Contrary To This Court's Precedent.

The lower court did not consider this Court's dearth of precedent regarding Due Process and Equal Protection and the application of the Fourteenth Amendment on the issue of the Takings Clause of the Fifth Amendment with respect to Georgia's procedural Expert Affidavit. The court below decided the instant matter without consideration of the underlying factual merit of Petitioners' claims, upholding the inferior courts order of summary judgment in which that court did not consider the merits either. App. 2, 3. Judicial inquiry into the merits is prohibited by O.C.G.A. § 9-11-9.1 if plaintiff is unable to comply with the procedural statute. O.C.G.A. § 9-11-9.1(a)(3) and (b). App. 19, 20.

Instead, the court below relied on flawed analysis of state law to support its reasoning that there is somehow no State action in play with respect to the Expert Affidavit statute and "appellants have failed to set forth a fundamental right they have been denied." *Peterson, supra,* App. 2. *In contra see Ambles v. The State*, 259 Ga. 406, 407, 383 S.E.2d 555 (1989), where the same lower court identified both the Bill of

Rights and procedural due process, among other things as being Fundamental Constitutional rights.

"The Due Process Clause of the Fourteenth Amendment stands . . . on its own head." *Griswold v. Connecticut*, 381 U.S. 500, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), recently cited by this Court in *Otis McDonald, et al. v. City of Chicago, Illinois, et al.*, 561 U.S. ___ (2010) (Stevens, J., dissenting Opinion at pg. 9).

As found by this Court in 1950, "[A] cause of action is a species of property protected by the Fourteenth Amendment." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Georgia recognizes a legal malpractice claim as a common law tort cause of action and a property interest that cannot be denied without due process. *Nix v. Long Mountain Resources, supra* (1992). "While the legislature may elect not to confer a property interest, . . . it may not authorize the depravation of such an interest, once conferred, without appropriate procedural safeguards," and this Court further stated that "minimum [procedural] requirements [are] a matter of federal law" within the scope of due process. *Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 636 L.Ed.2d 5521 (1980).

In *Societe Internationale v. Rogers*, 357 U.S. 197, 78 S.Ct. 1087, 26 L.Ed.2d 1256 (1958), this Court read the "property" component of the Fifth Amendment Due Process Clause to impose "constitutional

limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Similarly, the Fourteenth Amendment Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed [rights]." *Logan v. Zimmerman Brush Co., supra,* citing *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

In *Logan,* a unanimous case involving a state terminating a plaintiff's cause of action based on procedural law, this Court held: "As our decisions have emphasized time and again, the *Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged.* Thus it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest." Citing *Boddie v. Connecticut, supra,* and *Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 316 L.Ed.2d 36 (1972) (emphasis supplied).

Respondents' arguments that an opportunity to be heard challenging this procedural requirement satisfied due process is without merit, in *Logan v. Zimmerman, supra,* this Court held: "it is not meaningful to discuss a post-termination hearing, because the property interest here is destroyed when the case is terminated." Georgia, along with the majority of

states, dismiss [terminate] with prejudice a professional malpractice claim for failure to comply with the expert statute.[6] The Walkers argued Georgia terminated the Walkers' claim pursuant to O.C.G.A. § 9-11-9.1 on the very day the complaint was filed, *prior to any judicial review.* App. 4, 16-18.

This Court affirmed the guarantee "to all individuals [of] a meaningful opportunity to be heard." *Boddie, supra.* Do the states make any distinction in applying expert affidavit procedural statutes to professional malpractice plaintiffs as opposed to non-professional negligence cause of actions? There is a glaring discrepancy between the costs associated with ordinary negligence plaintiffs and professional negligence plaintiffs which render these statutes grossly unreasonable and unobtainable for "all individuals." When the indigent Walkers filed suit in the lower action in 2009 the paid in costs associated with the filing of a non-professional negligent actor claim were $125.00 for filing and $25.00 for service. Because the Walkers were found indigent those costs were waived. App. 10-11. When faced with complying with the states Expert Affidavit statute the costs of filing a common law prima facie professional negligence claim added from $3,000.00 to $20,000.00. Those costs were not waived, leaving the Walkers unable to obtain an expert affidavit. The court below

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[6] Certificates of Merit and Medical Malpractice: What's at Stake for States, Amy Widman, Center for Justice & Democracy (October 30, 2009), *supra.*

accepted Respondents' arguments that the Expert Affidavit statute imposed no costs upon the Walkers; *Peterson, supra*, but no evidence was offered to rebut the sworn testimony of Joel D. Walker that the Walkers were *unable*, not unwilling, to comply with the statute. App. 7-8. The Oklahoma Supreme Court in *Zeier v. Zimmer, Inc., supra,* found costs ranged from $500.00 to $12,000.00 to obtain an expert affidavit and violated access to courts and denied equal protection. As the West Virginia Supreme Court noted in *Westmoreland v. Vaidya, supra,* plaintiff argued the costs of expert affidavit was $40,000.00 and the case remanded.

As this Court held in *Boddie v. Connecticut, supra,* "'absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard,' thus, the State's imposition of substantial filing and other fees [$60.00] upon indigents seeking divorces was held to deny them due process."

This Court has also explicitly held that not every civil litigant is entitled to a hearing on the merits in every case, but that statement is qualified by the very grounds that Petitioners argue in this matter, the "state may erect ***reasonable*** procedural requirements for triggering the right to an adjudication . . . And the State certainly accords due process when it terminates a claim for failure to comply with a **reasonable procedural** or evidentiary rule." *Logan v. Zimmerman, supra,* citing *Hammond Packing Co. v.*

Arkansas, 212 U.S. 351 29 S.Ct. 370, 53 L.Ed. 530 (1908) (emphasis supplied). As shown in this matter, is it reasonable for any state by statute to require implicitly or explicitly that a professional malpractice victim has to pay at least 2000% more than any other tort victim simply to file a claim? (*See, e.g.*, New York does not require a pro se plaintiff to attach expert affidavit upon filing; *Certificate of Merit and Medical Malpractice, supra*). Is it reasonable for Oklahoma to conclude that expert affidavit costs in that state are from "$500 to $5,000 and in one instance $12,000" noting that "Here, the Legislature has not imposed a set fee for a professional's opinion to support the affidavit of merit [which] necessarily conditions the medical malpractice plaintiff's right to judicial review." *Zeier v. Zimmer, Inc., supra* (¶ 26, 28). But, according to Georgia, "Nothing in OCGA § 9-11-9.1 imposes a cost or fee for filing or obtaining an expert affidavit. The 'costs' appellants object to are created by private actors, not any state actor . . . and does not violate the right to due process." App. 2.

The expert affidavit requirement of O.C.G.A. § 9-11-9.1 has no counterpart in the general law of tort claims. Only professional malpractice plaintiffs are burdened with the necessity and cost of obtaining and filing with their complaint, an expert affidavit.

Georgia and the United States Constitutions are substantially the same on Equal Protection provisions.[7]

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[7] *McDaniel v. Thomas*, 248 Ga. 632, 295 S.E.2d 156 (1981).

The legislative purpose for O.C.G.A. § 9-11-9.1 is "to reduce the number of frivolous malpractice suits from being filed against professionals."[8] In *Logan v. Zimmerman supra,* this Court held: "it is not enough under the Equal Protection Clause to say the legislature sought to terminate certain claims and succeeded in doing so, for that is a mere tautological recognition of the fact that the [legislature] did what it intended to do." "In other words the State converts similarly situated [malpractice] claims [meritorious without affidavit] into dissimilarly situated ones [without merit, with an expert affidavit], and then uses this distinction as the basis for its classifications. Justice Blackmun further stated in *Logan*: "This, I believe, is the very essence of arbitrary state action." (emphasis supplied).

This type of state procedural law enacted to reduce "frivolous" claims regarding individual's causes of action has been struck down by this Court on Equal Protection grounds based on the very issues at point in this case:

"The claim that the double-bond requirement [a fee not paid to the state] operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can

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[8] *0-1 Doctors Mem. Holding Co. v. Moore*, 190 Ga. App. 286, 288, 378 S.E.2d 708 (1989).

afford the bond." (emphasis supplied). *Lindsey v. Normet, supra.* "Here, of course, the FEPA may operate to terminate meritorious claims without any hearing at all, while allowing frivolous complaints to proceed through the entire administrative and judicial review process. I have no doubt that such [statute] is patently irrational in the light of its stated purposes." *Logan, supra.*

"Giving preference to a discrete class merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection clause." *Reed v. Reed,* 404 U.S. 71, 76, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

With the lower court's decision in such complete contrast with this Court's precedent and recent state's highest court of last resort decisions on the issues of due process and equal protection, this Court should provide the necessary guidance by considering this case.

III. The Georgia Supreme Court Has Decided An Important Question Of Federal Law That Has Been Considered But Not Settled By This Court Regarding The Fifth Amendment Takings Clause As Applied Against The States Through The Fourteenth Amendment.

When the state either legislatively or judicially seizes, dismisses, or terminates a recognized property

right of legal cause of action without hearing, and without compensation, does this violate the "Takings Clause" of the Fifth Amendment. This Court has recently answered in the affirmative in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. ___ (2010), *supra*, inviting a future case to help elucidate this issue.

The lower court addressed Petitioners' arguments regarding *state legislative* termination of their professional cause of action: "The dismissal of appellants' professional negligence claim is a purely judicial action prompted by appellants' motion to dismiss." App. 4.

O.C.G.A. § 9-11-9.1(a)(3)(b) makes no requirement for any judicial motion to dismiss a professional malpractice claim wherein an expert affidavit was not attached to the plaintiff complaint. "If either affidavit is not attached . . . , the complaint **shall be dismissed** for failure to state a claim." (emphasis supplied). App. 19-20. In other words, file a meritorious professional malpractice complaint without an expert affidavit and the claim is terminated either at its inception, or upon final judicial dismissal, without hearing, and without compensation. App. 17-18. The lower court denied rehearing on this matter on July 12, 2010. App. 14.

Until the State judicially terminated the Walkers' cause of action was there a "Taking"? The Walkers could not complain of a final judicial taking until such action occurred and this Court addressed this very

issue in *Stop the Beach Renourishment, supra.* *See* n.4 at pg. 7.

What are the states' motives for terminating meritorious (or all) professional causes of actions? In the mid 1980's, a national tort reform movement swept the United States. Advocates consisting of Insurance Companies, Businesses, and Doctors cited "staggering" damage awards in recent years as evidence that the system is "far out of balance."[9] The legislative purpose for O.C.G.A. § 9-11-9.1 was "to reduce the number of frivolous malpractice suits from being filed against professionals."[10]

In 2005, Georgia enacted the Tort Reform Act of 2005, which again amended O.C.G.A. § 9-11-9.1. Specifically, the Legislature found that health care providers and facilities were being negatively affected by diminishing access to and increasing costs of procuring liability insurance, and that these problems in the liability insurance market bore the potential to reduce Georgia citizens' access to health care services, thus degrading their health and well-being. Ga. L. 2005. pg. 1, § 1. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, et al.*, 272 Ga. 731, 691 S.E.2d 218 (2010).

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[9] Elder Witt writing for Governing Magazine/November 1987. http//www.governing.com/archive/1987/nov/tort.txt Copyright 1987, Congressional Quarterly, Inc.

[10] *0-1 Doctors Mem. Holding Co. v. Moore*, 190 Ga. App. 286, 288, 378 S.E.2d 708 (1989).

When the state effects a taking of a meritorious professional cause of action it does so for a purported public benefit of reducing frivolous suits and keeping professionals from fleeing the state. Thus each time a meritorious professional cause of action is dismissed for failure to attach an expert affidavit the state seizes what was once characterized as private property and converts it to a public use. "In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." *Stop the Beach, supra,* at pg. 10 (emphasis in original).

"[A] State, by *ipse dixit*, may not transform private property into public property without compensation." (emphasis in original). *Ibid.*

Because over half the state's highest courts have and continue to grapple with the issue of constitutional conformation of affidavits of merit this Court's guidance is necessary and further illustrates why this Court should take this case.

IV. This Case Is An Excellent Vehicle For Elucidating The Protection And Rights Of Victims Of Professional Negligence In Relation To State And Federal Government Tort Reform Measures.

In *Zeier v. Zimmer, Inc., supra*, Oklahoma's highest court conducted an exhaustive review of scholarly research into various states' application of affidavits of merit in professional malpractice actions.

This commendable effort is worthy of consideration by this Court in this case.

Oklahoma cited many scholarly references for the proposition that expert affidavit costs have produced a substantial and disproportionate reduction in the number of claims filed by low income plaintiffs. The affidavit of merit provisions front-load litigation costs and result in the creation of cottage industries of firms offering affidavits from physicians for a price. They also prevent meritorious medical malpractice actions from being filed. The affidavits of merit requirement obligates plaintiffs to engage in extensive pre-trial discovery to obtain the facts necessary for an expert to render an opinion resulting in most medical malpractice causes being settled out of court during discovery. Rather than reducing the problems associated with malpractice litigation, these provisions have resulted in the dismissal of legitimately injured plaintiffs' claims based solely on procedural, rather than substantive, grounds. Another unanticipated result of statutes similar to Oklahoma's scheme has been the creation of a windfall for insurance companies who benefit from the decreased number of causes they must defend but which are not required to implement post-tort reform rates decreasing the cost of medical malpractice insurance to physicians. These companies happily pay less out in tort-reform states while continuing to collect higher premiums from doctors and encouraging the public to blame the victim or attorney for bringing frivolous lawsuits.

Citing – D. Kopstein, "An Unwise 'Reform' Measure." *See also*, C. Kozak, "A Review of Federal Medical Malpractice Tort Reform Alternatives," 19 Seton Hall Legis. J. 599, 642 (2003) [Certificates of merit may result in a denial of court access if drafted in such a way as to impose significant burdens on individuals seeking to sue their health care provider.].

K. Frazier, "Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?," 57 Ark. L. Rev. 651, 689 (2004).

M. Stroub, "The Unforeseen Creation of a Procedural Minefield – New Jersey's Affidavit of Merit Statute Spurs Litigation & Expense in its Interpretation & Application," 34 Rutgers L.J. 279, 282 (2002).

K. Frazier, "Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?," *see* note 47 at pg. 693, *supra*. *See also* C. Sharkey, "Unintended Consequences of Medical Malpractice Damages Caps," 80 N.Y.U. L. Rev. 391, 404 (2005).

J. Edgar, "Doctor v. Attorney: Why are Attorneys & Injured Patients Being Blamed for the Rising Costs of Healthcare? Instead of Tort Reform, Why Medical Reform is a Better Solution," 73 UMKC L. Rev. 773 (2005); T. Trimble, "The Maryland Survey: 1994-1995 Recent Developments The Maryland General Assembly," 55 Md. L. Rev. 893, 907 (1996) [In 1987, the year after the certificate of merit requirement went into effect, the medical malpractice filing rate declined approximately 36% from the previous year. By 1996, however, filing rates had nearly returned to

their pre-certificate levels.] Furthermore, the majority of medical malpractice trials end with defense verdicts and rational attorneys do not file malpractice cases that have not been thoroughly researched and "blessed" by a qualified expert. D. Kopstein, "An Unwise 'Reform' Measure."

Furthermore, plaintiffs' lawyers often will not file a cause where the claim is a mere $10,000.00 – indicating that such a cause is not sufficient to warrant the cost of obtaining an expert to provide an affidavit. M. Stroub, "The Unforeseen Creation of a Procedural Minefield – New Jersey's Affidavit of Merit Statute Spurs Litigation & Expense in its Interpretation & Application."

The history of Georgia's expert affidavit statute, O.C.G.A. § 9-11.9.1, has been scholarly researched.

In 1986, Georgia joined with 41 states in enacting some type of "tort reform legislation."[11]

The impetus for the enactment of section 9-11-9.1 was a report issued in 1986 by a tort reform advisory committee appointed by Georgia's governor.[12]

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[11] J. Hunter and J. Doroshow "Premium Deceit," The failure of "Tort Reform" to cut Insurance Prices. Copyright 1999, 2002 Center for Justice & Democracy.

[12] Georgia's Professional Malpractice Affidavit, Robert D. Brussack, University of Georgia School of Law 31 Ga. L. Rev. 1036 (1996-1997).

The chair of the advisory committee expressed strong support for the recommendation describing it as "the most important action taken by the committee" because an affidavit requirement "will have a substantial impact in the reduction of the number of groundless suits filed against professionals and against businesses." *Id.* at 1036.

Since the inception of O.C.G.A. § 9-11-9.1 in 1987 and its amendments and revisions of 1989, 1997, 2005, 2006 and 2007,[13] the Georgia Legislature has used politically driven rationale, hypothesis, conjecture and speculation to support and pass this act. There *exists* no *empirical data* in Georgia supporting the argument that there are too many frivolous malpractice claims filed against professionals.[14]

"Fact-based studies of tort litigation in Georgia are almost nonexistent." *Id.* at 635.

"Georgia is one of many states that does not provide the National Center for State Courts with any information regarding tort litigation patterns." "Georgia does not provide such information because it is not compiled." *Id.* at 635.

Both Georgia's appellate judges and legal scholars have strongly concluded that section 9-11-9.1

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[13] Official Code of Georgia Annotated 2008.

[14] T.A. Eaton and S.M. Talarico, "A Profile of Tort Litigation In Georgia and Reflections on Tort Reform," 30 Ga. L. Rev. (1995-1996) 631-636, 641, 642, 647.

should be repealed and that it does not deter the filing of a substantial number of groundless claims.[15]

The authors of the 1995 survey of Georgia trial practice and procedure published in the Mercer Law Review called for the repeal of section 9-11-9.1, describing the statute as an "ill-conceived enactment."[16]

"For the fourth consecutive year, the expert affidavit witness affidavit requirement of Code section 9-11-9.1 consumed a disproportionate amount of judicial resources."[17] Citations from Walkers' Brief in Reply to Defendants' Motions . . . , initial court May 24, 2009.

Given Oklahoma and Georgia's highest courts taking an inapposite ruling on the constitutional issue of expert affidavits, the conclusion of legal scholars are clear: Affidavits of merit in professional negligence cause of actions do not reduce such litigation and are unsupported by any fact throughout the United States that they have, or add, value to the public. Regarding tort reform and its impact on reducing medical malpractice claims, the U.S. General Accounting Office in 2003 performed a detailed

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[15] Georgia's Professional Malpractice Affidavit, Robert D. Brussack, University of Georgia School of Law 31 Ga. L. Rev. 1033, 1034, 1088, 1099 (1996-1997).

[16] C.F. Overby, et al., Survey Article, Trial Practice and Procedure, Annual Survey of Georgia Law, 47 Mercer L. Rev. 353, 368 (1995).

[17] Cynthia Trimboli Adams et al. Torts, Annual Survey of Georgia Law, 47 Mercer L. Rev. 311, 317 (1995).

study on the causes of rate increases in medical malpractice claims.[18] The GAO further cautioned in its report "that the data which would enable it to analyze the severity of medical malpractice claims, as well as data showing how losses were divided, "*did not exist*."

What expert affidavit statutes do accomplish is clear. Meritorious cause of actions are seized by states, and the victims, usually poor, are left uncompensated from their injuries by both the state and the original wrong-doer. As the ultimate Court of last resort in this land the Court should take this case.

CONCLUSION

The Supreme Court of Georgia's deference to the state's professionals may be noble, but misplaced. This Court has made clear through its decades of precedent under the Fourteenth Amendment Due Process and Equal Protection Clause that *every individual* is accorded the right to be heard on the merits before the state deprives that individual "of life, liberty, or property."

It is not too late for this Court to assure that all States, not some, accord due process to an individual

[18] "Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates" (June 2003) U.S. General Accounting Office (GAO-03-702).

injured by a professional wrong-doer or ultimately by the State.

This case also presents the perfect opportunity for this Court to correct wrongful "Takings" by the States of private property under the Fifth and Fourteenth Amendments, under the guise of Tort Reform.

Petitioners respectfully pray that the Court grant the Petition.

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: June 28, 2010

S10A0518. WALKER et al. v. CROMARTIE et al.

BENHAM, Justice.

Appellants Joel and Patricia Walker filed an action for legal malpractice, ordinary negligence, and breach of fiduciary duty against appellees for legal work appellees performed in the case *All Fleet Refinishing, Inc. v. West Georgia National Bank,* 280 Ga. App. 676 (634 SE2d 802) (2006). Appellants did not file an expert affidavit with their complaint as required by OCGA § 9-11-9.1 for a professional negligence claim.[1] As a result, appellees filed a partial motion to dismiss. In response, appellants alleged that OCGA § 9-11-9.1 was unconstitutional as applied to indigent litigants. A hearing was held on the dismissal issue and, because the trial court received evidence at the hearing, the partial motion to dismiss was converted into a partial motion for summary judgment. On July 16, 2009, the trial court granted

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[1] OCGA § 9-11-9.1 (a) states in pertinent part:

> In any action for damages alleging professional malpractice against:
>
> (1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section;
>
> . . . the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

the partial motion for summary judgment, finding the statute was constitutional and dismissing appellants' legal malpractice claim.[2] We now affirm.

1. Appellants argue it was error for the trial court to grant a partial motion for summary judgment because no such motion was filed. However, the trial court received evidence during the dismissal hearing. Therefore, the partial motion to dismiss was properly converted to a partial motion for summary judgment pursuant to OCGA § 9-11-12(b). There was no error.

2. Appellants contend that OCGA § 9-11-9.1 is unconstitutional because the expert affidavit requirement prohibits indigent plaintiffs from pursuing their actions for professional negligence due to the costs of procuring an expert affidavit, thereby violating their due process rights, equal protection rights, and their right to trial. We disagree. Absent a showing of state action, appellants cannot sustain a claim that OCGA § 9-11-9.1 interferes with their right to due process, their right to equal protection or their right to trial. *Peterson v. Columbus Medical Center Foundation,* 243 Ga. App. 749 (3) (533 SE2d 749) (2000).

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[2] The trial court did not make a ruling as to appellants' breach of fiduciary duty claim and so the case is still pending in the trial court. We granted appellants' application for interlocutory review in order to address the constitutional questions raised.

Nothing in OCGA § 9-11-9.1 imposes a cost or fee for filing or obtaining an expert affidavit. The "costs" appellants object to are created by private actors, not any state actor. Since no state actor has exacted the harm of which appellants complain, the statute does not violate the right to due process. See *Etkind v. Suarez,* 271 Ga. 352 (4) (519 SE2d 210) (1999); *Reinertsen v. Porter,* 242 Ga. 624 (1) (250 SE2d 475) (1978) ("The due process clauses of the United States and Georgia Constitutions control only the actions of states, not those of private individuals"). Likewise, the statute does not violate equal protection. "In evaluating legislation under an equal protection claim, the claimant must first establish that he is similarly situated to members of a class who are treated differently than he." *Drew v. State,* 285 Ga. 848 (2) (684 SE2d 608) (2009). Here, the statute makes no distinction between any class of citizens since it requires any person or entity that brings an action for professional negligence to file an expert affidavit. Since appellants cannot show any disparate treatment, their equal protection argument cannot be sustained on that basis. *Drew v. State,* supra, 285 Ga. at 849-50.

Poverty alone is not a suspect classification for the purpose of equal protection analysis (*Harris v. McRae,* 448 U.S. 297, 323 (100 SC 2671, 65 LE2d 784) (1980)) and appellants have failed to set forth a fundamental right they have been denied. When neither a suspect classification nor a fundamental right is at stake, a rational relationship test is applied to

determine whether the statute violates equal protection. *Love v. State,* 271 Ga. 398 (2) (517 SE2d 53) (1999). That is, the statute must bear a direct relationship to the legitimate legislative purpose. Id. at 400. The purpose of OCGA § 9-11-9.1 is to reduce the number of frivolous malpractice lawsuits being filed against professionals. *Minnix v. Department of Transportation,* 272 Ga. 566, 571 (3) (533 SE2d 75) (2000). The requirement of filing an expert affidavit at the time the complaint is filed serves this stated purpose because it requires plaintiffs to find an expert who will attest that at least one act of professional negligence has occurred, thereby reducing the number of frivolous claims filed.

Finally, inasmuch as appellants' breach of fiduciary duty claim is still pending in the trial court, they have not in fact been denied access to the courts or the right to a trial by jury. The trial court did not err in rejecting appellants' various arguments and dismissing their professional negligence claim.

3. Appellants argue that OCGA § 9-11-9.1 violates the separation of powers clause (Ga. Const. of 1983, Art. I, Sec. II, Para. III) by allowing the legislature to determine which cases go to trial. To the contrary, the legislature, by drafting and implementing this statute, has merely enacted a law that requires an extra pleading when bringing forth a professional negligence claim. The dismissal of appellants' professional negligence claim is a purely judicial action prompted by appellees' motion to dismiss.

4. Appellants contend that OCGA § 9-11-9.1 is a special law. That contention, however, is without merit. The Uniformity Clause of the Georgia Constitution provides:

> Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.

Ga. Const. of 1983, Art. III, Sec. VI, Para. IV(a). A special law is a law that only affects a limited area or class, whereas a general law applies uniformly to the subject with which it purports to deal. *Lasseter v. Georgia Public Service Commission*, 253 Ga. 227 (2) (319 SE2d 824) (1984) (law that affected a single plant in a particular industry was an unconstitutional special law). Appellants' argument that OCGA § 9-11-9.1 is a special law because indigent defendants may not be able to afford the fees associated with obtaining an expert affidavit is unfounded. The law applies uniformly to any person or entity bringing a lawsuit for professional negligence. Any disparities in the costs associated with obtaining an expert affidavit are circumstances beyond the scope or control of the statute. Accordingly, the trial court

did not err when it ruled that the statute withstood the constitutional challenges raised by appellants.

Judgment affirmed. All the Justices concur.

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

Joel D. Walker and
Patricia A. Walker,

Plaintiffs

Versus

H.L. Cromartie et al,

Defendants

Civil Action File
No. 09CV0397

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiffs filed suit against the defendants alleging legal malpractice in regard to the filing of various claims and counterclaims against the West Georgia National Bank. The plaintiffs allege professional malpractice, ordinary negligence and breach of fiduciary duty. They seek a judgment for $142,042,747.29 for alleged losses as well as attorney's fees assessed against them for filing a frivolous racketeering claim against the bank. These claims arise out of a case litigated in Carroll County Superior Court and appealed to the Court of Appeals in All Fleet Refinishing, Inc. et al v. West Georgia National Bank, 280 Ga.App. 676, 634 S.E.2d 802 (2006).

The defendants move for summary judgment on the legal malpractice claim because the plaintiff did not attach the affidavit of an expert as required by

O.C.G.A.§ 9-11-9.1 for actions against attorneys or other professionals for malpractice.

The plaintiffs respond that they are unable to afford to hire an attorney to render an affidavit. They also contend that the law's requirement is unconstitutional on various grounds.

The plaintiffs cite authority from other states to support their contention that the statute is a special law and hence unconstitutional. Those decisions rely upon the provisions of the state constitutions of those other states. The Georgia Constitution does not include the same language as that used by the constitutions of the other states and therefore those rulings do not apply.

The constitutionality of the statute is a well established ruling under Georgia law. Etkind v. Suarez, 271 Ga. 352, 519 S.E.2d 210 (1999); Peterson v. Columbus Medical Center Foundation, Inc., 243 Ga.App. 749, 533 S.E.2d 749 (2000) [Expert affidavit requirement did not violate medical malpractice plaintiff's right to trial, to due process, and to equal protection under law, despite claim that she was unable to pay for medical records necessary for obtaining affidavit; there was no state action, as costs of copying medical records were charged by private entities, not state.]; Frazier v. Merritt, 190 Ga.App. 832, 380 S.E.2d 495 (1989). See also Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) [due process denied to indigent plaintiffs who

could not bring divorce action except upon payment of court fees and service of process costs].

This court finds that the statute is constitutional as applied here since there is no state action in play.

It is undisputed that the plaintiffs did not comply with the requirement that they file an expert affidavit.

The court therefore dismissed the plaintiffs' cause of action for legal malpractice. The court does not rule on the plaintiff's action for breach of fiduciary duty.

So ordered this July 8, 2009.

/s/ David Emerson
David Emerson
Judge Superior Court
Floyd Judicial Circuit
By Designation

Judge's Distribution List:

Joel D. Walker and Patricia A. Walker
220 Gamble Drive
Carrollton, GA 30116

Kim Jackson, Esquire
4000 SunTrust Plaza
303 Peachtree Street
Atlanta, GA 30308-3243

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

Joel D. Walker and
Patricia A. Walker,

Plaintiffs

Versus

H.L. Cromartie et al,

Defendants

Civil Action File
No. 09CV0397

ORDER ON TRAVERSE
OF PAUPER'S AFFIDAVIT

The defendants have traversed the plaintiffs' paupers' affidavits. The plaintiffs contend they were unable to pay the filing fee in this action. The court notes that under cross examination, the defendant Joel Walker acknowledged that when he filed this action, he and his wife were both employed. He acknowledged that he owns a home in a different county that is subject to a mortgage. The court notes that the plaintiffs here seek a judgment not only for $42,000+ of attorneys fees they contend the defendant caused them to be assessed because they sought to file a racketeering counterclaim in a separate case in Carroll County, but they also seek a judgment for $174,000,000 [sic] against the defendants.

The plaintiff testified that he owed a huge amount of money to the Internal Revenue Service,

however, he also claimed that the I.R.S. had agreed to accept $1,700.

Counsel for the defendants did not ask the plaintiff what their income was at the time of filing of the action. He also did not inquire about any bank accounts or other assets that might be available to the plaintiffs.

The evidence before the court at this point is insufficient for the court to find that the traverse should be sustained. It is therefore denied.

So ordered this July 8, 2009.

/s/ David Emerson
David Emerson
Judge Superior Court
Floyd Judicial Circuit
By Designation

Judge's Distribution List:

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IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

Joel D. Walker and
Patricia A. Walker,

Plaintiffs

Versus

H.L. Cromartie et al,

Defendants

Civil Action File
No. 09CV0397

ORDER

The court finds that there was a justiciable for the court to address on this matter. The court therefore denies the defendant's motion for attorney's fees.

So ordered this July 28, 2009.

/s/ David Emerson
David Emerson
Judge Superior Court
Floyd Judicial Circuit
By Designation

Judge's Distribution List:

Joel D. Walker and Patricia A. Walker
220 Gamble Drive
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[SEAL] SUPREME COURT OF GEORGIA
Case No. S10A0518

Atlanta, July 12, 2010

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JOEL D. WALKER et al.

v.

H.L. CROMARTIE et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur.

IN THE SUPREME COURT
OF THE STATE OF GEORGIA

JOEL P. WALKER and PATRICIA A. WALKER,	*	
Appellants,	*	
vs.	*	**CASE NUMBER**
H.L. CROMARTIE, III and H.L. CROMARTIE, III PC and HUSSER & CROMARTIE LLP,	*	**S10A0518**
Appellees	*	

MOTION FOR RECONSIDERATION

Appellant Walkers respectfully urge this Court to reconsider its June 28, 2010 Order affirming the trial courts Partial Summary Judgment Order to Defendant-Appellee Cromartie on the Walkers legal malpractice claims, and this Courts holding that O.C.G.A. § 9-11-9.1 is constitutional.

FACTS

The undisputed facts reveal attorney Cromartie filed on behalf of the Walkers $174,000.00 in civil claims. Cromartie admitted in a recorded hearing that his actions caused or contributed to the Walkers losing the claims in those matters. Additionally, Cromartie admitted his, and only his actions resulted in a $43,000.00 judgment being assessed against the

Walkers. Cromartie additionally stated that he would "take the hit" for his acts of negligence. Cromartie by affidavit in response to the Walkers Complaint, verified these facts. "A lawyer was 'an expert competent to testify' despite the lawyer's previous representation of the plaintiff in this matter and the fact that that the lawyer had a financial interest in the outcome of this suit at the time he submitted his affidavit." *Findley v. Davis,* 202 Ga. App. 332, 414 S.E.2d 317 (1991) Based upon these admissions the Walkers attempted to settle this matter without litigation. Cromartie even filed an insurance claim based upon his negligence without any threat of litigation. In any other negligence action, other than one for professional malpractice, these admissions against interest would not only survive a motion to dismiss and a motion for summary judgment, but alone these statements would render a jury verdict in favor of the Walkers. In requiring the Walkers to have obtained an "expert" to confirm Cromartie's admissions, this Courts decision elevates form over substance and leaves each citizen harmed by a professionals admitted negligence in a position that he can either afford the thousands of dollars (just for the expert, not to mention an attorney) to obtain some form of justice, or simply write it off because the negligent professional is afforded a get out of jail for free card pursuant to OCGA 9-11-9.1.

* * *

The point that the Court overlooks is, irrespective of any "costs" associated with a "private actor"

determining any issues of fact, (did the professional commit negligence) State action alone compels the plaintiff have such "private actor," and without such "private actor" the State mandates "the complaint shall be dismissed for failure to state a claim," even when in the Walkers case **the professional admitted his negligence**. OCGA § 9-11-9.1(a)(3) and (b), (Opinion of this Court, pp.2-3, ¶ 2)

DUE PROCESS

A careful reading of OCGA 9-11-9.1 reveals the legislative language contained in subsection (a) mandates "the plaintiff *shall* be required to file with the complaint an affidavit of an expert competent to testify . . . ," Subsection (b) "If either affidavit is not filed within the periods specified in this Code section, . . . the complaint *shall* be dismissed for failure to state a claim." This unambiguous language does not contain any requirement upon a defendant to file a motion to dismiss. The legislative intent must be drawn from the exact words of the act. Without an expert affidavit pursuant to 9-11-9.1(a) and (b) the complaint stands as dismissed upon filing. Contrary to this Courts holding in *Opinion* ¶ 3 a purely *legislative* act dismissed the Walkers professional negligence claim, not a judicial act which would infer judicial adjudication of those claims. 9-11-9.1 requires a motion to dismiss be filed by the defendant in two instances: Subsection (e) pertains to a defective affidavit requiring the defendant "file a motion to dismiss filed on or before the close of discovery . . . " Subsection (f)

states; "If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the *renewal provisions of Code Section 9-2-61 . . .*"

State action either legislatively, or judicially terminated the Walkers professional negligence claims literally before the Walkers entered the court house doors.

Worthy of repeating, regardless of whether an expert affidavit is free or not, if a plaintiff fails to attach one to his complaint, the State, and State action alone terminates his cause of action without benefit of a hearing on the merits of the underlying action and this violates due process.

* * *

O.C.G.A. § 9-11-9.1. Affidavit to accompany charge of professional malpractice

(a) In any action for damages alleging professional malpractice against:

(1) A professional licensed by the State of Georgia and listed in subsection (g) of this Code section;

(2) A domestic or foreign partnership, corporation, professional corporation, business trust, general partnership, limited partnership, limited liability company, limited liability partnership, association, or any other legal entity alleged to be liable based upon the action or inaction of a professional licensed by the State of Georgia and listed in subsection (g) of this Code section; or

(3) Any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (g) of this Code section,

the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) The contemporaneous affidavit filing requirement pursuant to subsection (a) of this Code section shall not apply to any case in which the period of limitation will expire or there is a good faith basis to believe it will expire on any claim stated in the

complaint within ten days of the date of filing the complaint and, because of time constraints, the plaintiff has alleged that an affidavit of an expert could not be prepared. In such cases, if the attorney for the plaintiff files with the complaint an affidavit in which the attorney swears or affirms that his or her law firm was not retained by the plaintiff more than 90 days prior to the expiration of the period of limitation on the plaintiff's claim or claims, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court shall not extend such time for any reason without consent of all parties. If either affidavit is not filed within the periods specified in this Code section, or it is determined that the law firm of the attorney who filed the affidavit permitted in lieu of the contemporaneous filing of an expert affidavit or any attorney who appears on the pleadings was retained by the plaintiff more than 90 days prior to the expiration of the period of limitation, the complaint shall be dismissed for failure to state a claim.

(c) This Code section shall not be construed to extend any applicable period of limitation, except that if the affidavits are filed within the periods specified in this Code section, the filing of the affidavit of an expert after the expiration of the period of limitations shall be considered timely and shall provide no basis for a statute of limitations defense.

(d) If a complaint alleging professional malpractice is filed without the contemporaneous filing of an

affidavit as permitted by subsection (b) of this Code section, the defendant shall not be required to file an answer to the complaint until 30 days after the filing of the affidavit of an expert, and no discovery shall take place until after the filing of the answer.

(e) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(f) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(g) The professions to which this Code section shall apply are:

(1) Architects;

(2) Attorneys at law;

(3) Audiologists;

(4) Certified public accountants;

(5) Chiropractors;

(6) Clinical social workers;

(7) Dentists;

(8) Dietitians;

(9) Land surveyors;

(10) Marriage and family therapists;

(11) Medical doctors;

(12) Nurses;

(13) Occupational therapists;

(14) Optometrists;

(15) Osteopathic physicians;

(16) Pharmacists;

(17) Physical therapists;

(18) Physicians' assistants;

(19) Podiatrists;

(20) Professional counselors;

(21) Professional engineers;

(22) Psychologists;

(23) Radiological technicians;

(24) Respiratory therapists;

(25) Speech-language pathologists; or

(26) Veterinarians.